

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 700 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgement?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : YES
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : YES

AHER MENSI RAMSI

Versus

AHERANI BAI MINI JETHA

Appearance:

MR RA MISHRA for appellant

MR SP DAVE for Respondent

CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 30/06/2000

ORAL JUDGEMENT

This is defendant's First Appeal against the judgment and decree passed by the learned Civil Judge (Senior Division), Junagadh in Special Civil Suit No.79 of 1994 on 15th November 1978.

2. From the contents of the impugned judgment, it appears that the present appellant, namely, Aher Mensi Ramsi and respondent herein, i.e. Aherani Bai Mini Jetha had married 35 years prior to the year 1974, i.e. some time in the year 1939. In the year 1974, when the husband was aged 54 years and the wife, i.e. respondent herein at the age of 51 years filed Special Civil Suit No.79 of 1994 in the Court of Civil Judge (Senior Division), Junagadh, claiming maintenance with charge on the properties of the defendant-husband. The wife, i.e. respondent herein, through the aforesaid suit claimed an amount of Rs.250/- per month under the provisions of the Hindu Adoption and Maintenance Act, 1956. In the suit, the case of the wife, i.e. plaintiff (respondent herein) was that she had married the present appellant as per Hindu rites and custom at village Arena, Taluka Mangrol about 35 years back. After about five years of her marriage, she was sent to her husband's place and that she was staying with her husband at village Danderi Taluka Malia-Hatine. It was further the case that out of this wedlock with the present appellant, two issues were born - one was daughter Bai Jeni and an other one was a son who expired at the age of 1 and 1/2 month. It was further stated that her husband, i.e. present appellant used to torture and beat her. It was also alleged that her husband had illicit relations with one woman named Bai Bheni alias Ameri and the same was objected to by the respondent herein and thereupon the appellant turned her out of the house, again called her with assurance to keep her nicely and yet, behaved with her with the same attitude as earlier and when she informed her father, her father took her back to village Arena. Thereafter the husband never called her and he used to live with Bai Bheni and that at the time when the suit was filed, he was yet living with Bai Bheni at his house. Thus, the wife, i.e. respondent herein was neglected and left uncared for and the appellant had refused to maintain her and the daughter. She, therefore, filed an application in the year 1953 under Section 488 of the Code of Criminal Procedure (old) i.e. Misc. Application No.31 of 1953 and in those proceedings, the husband had agreed to pay the maintenance at the rate of Rs.15/- per month and the order was passed accordingly by the Court. The wife was staying at her father's place for about 25 years, but her husband did not care. Later on, the daughter Bai Jeni had been married to one Rambhai Govind about 8 years prior to the time when the suit was filed in the year 1974. The wife while filing the Civil Suit has also stated that in Cri.Misc. Application No.31 of 1953 a sum of Rs.15/- per month had been granted to her

as maintenance under Section 488 of old Cr.P.C. but such amount being too meagre she had again applied before the Court of First Class Magistrate, Veraval, in the year 1973 through Misc. Application No.54 of 1973 under Section 489 of the Code of Criminal Procedure (old) in which the husband agreed to increase the maintenance amount to the tune of Rs.45/- per month which was to be paid in two instalments in a year. The husband, in order to defeat her rights in the properties held by the defendant, wanted to mutate the name of Bai Bheni in the revenue record and therefore, the respondent herein gave a notice by Regd. Post on 2.11.1973. The husband did not care for the same, on the contrary, tried to assassinate the wife's character and had also filed a suit for divorce against her on the ground of adultery through Hindu Marriage Petition No. 68 of 1973, but the said suit for divorce was dismissed. The wife-respondent then filed a case of defamation against her husband, the appellant and in that case, the appellant was punished with a fine of Rs.500/-. The respondent herein, i.e. wife filed the present Special Civil Suit in the year 1974 (Special Civil Suit No.79 of 1974) claiming that the amount of maintenance of Rs.45/- per month was not at all sufficient for her maintenance in the days of hardship and dearness and therefore, she claimed the amount of Rs.250/- per month under Section 18 of the Hindu Adoption and Maintenance Act, 1956 along with the prayer that charge of her maintenance be kept on the properties of the defendant, otherwise the defendant may transfer the properties and in that case it would be difficult for her to get the maintenance. It was further alleged by her that her husband, i.e. the appellant herein was a well-to-do person, was having sufficient funds and was in a position to pay the maintenance of Rs.250/- per month, that he was having 100 Bighas of valuable and fertile land, was having four houses at village Danderi, the said properties were ancestral properties, that he was also having good amount in cash, ornaments, cattle and two electric machines. In sum and substance, it was alleged that he was having movable and immovable properties worth Rs.3 lacs. The aforesaid suit was resisted by the husband by filing a written statement in which various contentions were taken. However, the factum of marriage between the parties was admitted and the allegations of torture etc. were denied. It was also denied that Bai Jeni was his daughter. It was also denied that he was having any illicit relations with Bai Bheni and it was pleaded that Bai Bheni was his legally wedded wife and that the lands were mutated in her (Bai Bheni) name since long, it was also denied that the plaintiff would require Rs.250/- per month as maintenance and it was also denied

that the properties in his possession were ancestral properties and it was pleaded that such properties were his self-acquired properties.

3. On the basis of the pleadings of the parties, the following Issues were framed by the trial Court:

1. Whether the suit is barred by principle of estoppel, waiver and acquiescence?
2. Whether the defendant neglects to maintain the plaintiff?
3. Whether the Court fee paid is insufficient?
4. Whether the plaintiff is entitled to claim maintenance at the rate of Rs.250/- p.m.?
5. Whether the suit property can be charged for the maintenance of the plaintiff?

Issue No.1 was answered in negative, but Issue No.2 was answered in affirmative. Issue No.3 was answered in negative whereas on Issue No.4, it was found that the plaintiff wife is entitled to claim maintenance of Rs.200/- per month. The trial Court held that the plaintiff was entitled for maintenance and that she was entitled to Rs.200/- per month from the date of the suit and further that the charge on the property of the defendant should also be kept in order to safeguard her future maintenance and for that purpose, Survey No.28/3 admeasuring 11 acres-21 gunthas and Survey No.24 admeasuring 7 acres-29 gunthas of the defendant husband should be kept as charge and the impugned order was passed accordingly.

4. I have gone through the available record and I have also heard learned Counsel for both the sides. I find that on the basis of the material and evidence on record, the Issues as were framed by the trial Court have been correctly decided. The trial Court has given reasons which justify the findings arrived at by him with regard to each of the Issues. Mr.Mishra for the appellant has submitted that the respondent herein was herself having land of 10 Bighas which she got from her father when he died after about four years of the filing of the present suit in 1974. He has also submitted that in view of the fact that the respondent herein was already getting maintenance as ordered in the proceedings

under Section 488 read with Section 489 of the Old Code of Criminal Procedure, she could not have claimed further maintenance by filing the present suit and even if such a suit had been filed, the same should have been dismissed by the trial Court as she was already getting the maintenance of Rs.45/- per month.

5. So far as the argument that the respondent herein held 10 Bighas of land as she got from her father, I find that the same has not been believed by the trial Court and there is no material or evidence of contemporaneous nature in support of this argument and I find that the view taken by the trial Court in this regard does not warrant any interference. The argument that she was already getting maintenance of Rs.45/- per month on the basis of the orders passed in the proceedings under the old Code of Criminal Procedure and therefore, she should not have been granted the maintenance of Rs.200/- per month by the trial Court in the present suit does not at all impress this Court and this argument cannot be said to be an argument of any substance. Merely because an order of maintenance had been passed under Section 488/489 of old Code of Criminal Procedure and the respondent herein was getting a sum of Rs.45/- per month could not come in her way to seek the maintenance under Section 18 of the Hindu Adoption and Maintenance Act, 1956. The grant and receipt of any amount of maintenance under the Code of Criminal Procedure is no bar or impediment to the grant of adequate amount of maintenance under Hindu Adoption and Maintenance Act, 1956. Provisions in the Code of Criminal Procedure are general in nature, whereas the Hindu Adoption and Maintenance Act is special enactment and any order passed under general law cannot close the remedy under special law. Relevant portions of Section 488 of old Cr.P.C./Section 125 of the new Cr.P.C. and Section 18 of the Hindu Adoption and Maintenance Act, 1956 are reproduced as under:

The Criminal Procedure Code (Old):

488. (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and

to pay the same to such person as the Magistrate from time to time directs.

- (2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.
- (3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that, if such person offers to maintain his wife on condition of her living with him and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

If a husband has contracted marriage with another wife or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him;

Provided further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due.

- (4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.
- (5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

- (6)....
- (7)....
- (8)....

Code of Criminal Procedure (New) :

Order for maintenance of wives, children and parents.

125. (1) If any person having sufficient means neglects or refuses to maintain-

- (a) his wife, unable to maintain herself or,
- (b)....
- (c)....
- (d)....

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

.....
.....
.....

Provided further that if such person offers to him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation: If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

- (4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.
- (5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that

they are living separately by mutual consent, the Magistrate shall cancel the order.

Hindu Adoption and Maintenance Act, 1956:

"18. Maintenance of wife.-- (1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance,--

(a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of wilfully neglecting her;

(b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;

(c) if he is suffering from a virulent form of leprosy;

(d) if he has any other wife living;

(e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;

(f) if he has ceased to be a Hindu by conversion to another religion;

(g) if there is any other cause justifying her living separately.

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

While the proceedings under Section 488/125 of old and new Cr.P.C. are of summary nature, it would also be clear from the reading of the aforesaid provisions that the order for maintenance under Cr.P.C. is for wives, children, and parents in case the husband having sufficient means neglects or refuses to maintain his wife

who is unable to maintain herself, upon proof of such neglect or refusal, the Magistrate may order such person to make a monthly allowance upto to the ceiling of Rs.500/- per month for the maintenance of his wife, child, father or mother. It has also been provided under sub-sections (4) and (5) of Section 488 of old Cr.P.C. as to in what cases the wife shall not be entitled and in what cases the order of maintenance already passed shall be liable to be cancelled. Sec.488 in Old Cr.P.C. was already there and was in force when Hindu Adoption and Maintenance Act, 1956 was enacted and brought in to force. Similarly, it is also to be noted that even in the year 1973 when old Cr.P.C. was amended, the provisions under Section 488 were retained in the Cr.P.C. by way of Section 125, and at that time, the Hindu Adoption and Maintenance Act, 1956 was already there. Thus, it is clear that the remedies under both these laws are available to the wife and these remedies are coexistent, mutually complementary, supplementary and in aid and addition of each other. Hence the remedy resorted to under either of the two cannot foreclose the remedy under the other Act. The very fact that despite the provisions for maintenance of wife being there under the Cr.P.C., while enacting the Hindu Adoption and Maintenance Act in the year 1956 through Section 18 thereunder, the specific provision was made for maintenance of wife, goes to show that Section 18 is a specific provision with regard to the maintenance of wife in this special enactment as compared to the provisions in the Cr.P.C. with regard to the wives, children and parents and that the provisions under the Cr.P.C. have to be read only in aid and addition to the specific right conferred with regard to the maintenance of wife under Section 18 of the Hindu Adoption and Maintenance Act, 1956 and not in derogation or denial thereof. The concept of maintenance to the wife is based on the matrimonial tie and obligates the husband to maintain his wife during his life time. This moral and social obligation has been incorporated as a legal liability in the Act because according to our social values, a non-earning wife without any means is considered to be dependent on the husband and the question of her maintenance consequential to the dependence cannot be left at the sweet will of the husband. Apart from the ground of inability of the wife to maintain herself, in case a husband with sufficient means neglects or refuses to maintain her as contemplated under Section 488/125 of old/new Cr.P.C., under Section 18 of the Hindu Adoption and Maintenance Act, 1956, a Hindu wife is entitled to live separately from her husband without forgoing her claim for maintenance on grounds enumerated under Section

18(2). Such grounds include desertion or abandonment by the husband without reasonable cause, cruelty, suffering of the husband from a virulent form of leprosy, in case the husband has any other wife living or keeps a concubine or ceased to be a Hindu by conversion or any other cause justifying her living separately. Thus, the provisions of Section 18 are far more wider as compared to the provisions of Section 488/125 of the Cr.P.C. old and new. It is, therefore, clear that any order of maintenance under Section 488/125 of Cr.P.C. old and new cannot foreclose the wife's remedy under Section 18(2) of the Hindu Adoption and Maintenance Act, 1956 and vice versa. These provisions do reflect the compassion of Law for Women and for their protection in conformity with the concept of reasonable classification against discrimination as provided in Art.15(3) of the Constitution of India which makes it permissible for the State to make special provisions for women.

6. In the facts of the present case, the appellant had gone to the extent of alleging adultery against the respondent, and had filed a petition under the Hindu Marriage Act for divorce in which he failed and in a case of defamation filed by the respondent against him for this allegation, he was subjected to a fine of Rs.500/-. It is also admitted case of the appellant that he had one other wife living. On such grounds, the respondent was certainly entitled to claim maintenance under Section 18 of the Hindu Adoption and Maintenance Act, 1956. Even otherwise, the order of maintenance of Rs.15/- per month which was later on revised to Rs.45/per month under the provisions of the Cr.P.C. had been passed long back. The sum of Rs.45/- per month can hardly be sufficient to meet the requirement of maintenance and if the trial Court has passed the order that she was entitled to maintenance at the rate of Rs.200/- per month notwithstanding the order passed under Section 488, 489 of old Cr.P.C., the same cannot be said to be illegal or unreasonable. The respondent had in fact claimed Rs.250/per month and therefore, while passing the order of maintenance of Rs.200/- per month only, it appears that the Court has kept in view the fact that she was already getting Rs.45/- per month on the strength of the orders passed for maintenance under the provisions of Cr.P.C.

7. By this time, it appears that the appellant must have attained the age of about 74 years and the respondent herein must have attained the age of 71 years. It is also clear that the appellant has sufficient means and properties and the payment of maintenance at the rate

of Rs.200/- per month to his wife is neither beyond his means nor it can be said to be unreasonable. The appellant cannot shirk to discharge his obligation. This Court finds that the findings arrived at by the trial Court do not suffer from any infirmity either of fact or of law and the impugned judgment and decree does not suffer from any infirmity whatsoever. This appeal, therefore, fails. The same is hereby dismissed. In the facts and circumstances of this case, no order as to costs.

(M.R. Calla, J.)

Sreeram.